

**Before the
Federal Communications Commission
Washington, D.C. 20544**

)	MB Docket No. 16-366
)	CSR No. 8927-A
In the Matter of)	
)	MB Docket No. 16-367
La Plata County, Colorado)	CSR No. 8928-A
)	
Petitions for Modifications of the)	MB Docket No. 16-368
Satellite Television Markets of KDVR-TV,)	CSR No. 8929-A
KCNC-TV, KMGH-TV, and KUSA-TV,)	
Denver, Colorado)	MB Docket No. 16-369
)	CSR No. 8930-A

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The Albuquerque Stations,¹ through counsel and pursuant to Rule 1.115 of the Commission's Rules, hereby reply to the Opposition to Application for Review filed by La Plata County, Colorado (the "County")² in response to the Albuquerque Stations' Application for Review³ seeking the full Commission's review of the Media Bureau's ("Bureau") decisions set out in its March 1, 2017 Memorandum Opinion and Order (the "Order")⁴ granting four satellite market modification requests filed by the County to add the County to the local television markets

¹ As set forth in the Application for Review, the Albuquerque Stations include Hearst Properties Inc., licensee of ABC affiliate KOAT-TV, Albuquerque, New Mexico, KOB-TV, LLC, licensee of NBC affiliate KOB(TV), Albuquerque, New Mexico, and Nexstar Broadcasting, Inc., licensee of KRQE(TV), Albuquerque, New Mexico, which is affiliated with the CBS and FOX networks.

² La Plata County, Colorado, Opposition to Application for Review, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369 (May 1, 2017) ("Opposition").

³ Hearst Properties, Inc., KOB-TV, LLC, and Nexstar Broadcasting, Inc., Application for Review, MB Docket Nos. 16-366, 16-367, 16-368, and 16-369 (Mar. 31, 2017) ("AFR").

⁴ *La Plata County, Colorado, Petitions for Modification of the Satellite Television Markets of KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV, Denver, Colorado*, Memorandum Opinion and Order, MB Dockets 16-366, 16-367, 16-368, 16-369 (rel. Mar. 1, 2017) ("Order").

of Denver television stations KDVR-TV, KCNC-TV, KMGH-TV, and KUSA-TV (collectively, the “Denver Stations”).

The County contends that Congress added “access to in-state stations” as the new, third statutory factor to be considered in analyzing market modification petitions in order to help address so-called “orphan” counties—and that, therefore, the Bureau’s grant of the County’s Petitions is consistent with Congress’s intent. But the County wholly fails to acknowledge, let alone address, the fact that neither Congress nor the Commission ever authorized or intended the “access to in-state stations” factor to completely subsume the second, “local service” factor and serve as a proxy for localized programming, to effectively trump all other statutory factors, and/or to relieve a petitioner of the Commission’s required evidentiary showing.

Contrary to the County’s claims that the Bureau properly weighed each of the five factors,⁵ the Order misapplied the “local service” and “access to in-state stations” factors and waived evidentiary requirements, leading to what is, effectively, a *per se* grant of any market modification petition solely because an “in-state” station could theoretically deliver programming of “statewide” interest to an orphan county. The County does not explain how STELAR⁶ or the Commission’s STELAR Order⁷ authorized market modification in circumstances where, as here,

⁵ Opposition, at 3-4. The County’s repeated arguments that the Bureau properly weighed all five factors do not make it so; *ipse dixit* is not an argument based in fact. *Cf., e.g., Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 14107, 14226 (2013) (Dissenting Statement of then-Commissioner Ajit Pai) (“Unfortunately, calling a measure ‘conservative’ 34 times doesn’t make it so.” (citing Inigo Montoya, *The Princess Bride* (Act III Communications 1987) (“You keep using that word. I do not think it means what you think it means.”))).

⁶ The STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014) (“STELAR”).

⁷ *Amendment to the Commission’s Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*; MB Docket No. 15-71, Report and Order, 30 FCC Rcd 10406 (2015) (“STELAR Order”).

(1) there is no market nexus between the station and the orphan county, (2) there is no evidence that the station provides local programming tailored to the residents of the relevant county, (3) the existing in-market stations do provide truly localized programming, and (4) the petitioner failed to provide the Commission with evidence required to make such a policy judgment.

To be clear, there are situations where grant of an orphan county market modification petition might be appropriate and could be done *without* conflating or misapplying the second and third statutory factors (as the Order does). For example, where an orphan county is geographically close to an “in-state” station that has a legitimate market nexus to the county and provides local programming tailored to the county’s needs and interests in a way that in-market, out-of-state stations do not, the new “access to in-state stations” factor—coupled with a properly applied “local service” factor—might well tip the analytical balance in favor of market modification. In this regard, the County’s failure to petition for access to Colorado stations located in the Grand Junction-Montrose DMA, which is much closer than Denver, suggests that the County’s real goal is to access *Denver*, not *Colorado*, stations.

The County fails to adequately defend the Bureau’s error in enhancing the second, “local service” factor. The County presented no evidence of local programming that is “specifically *targeted to the community at issue*”⁸ and only offered evidence of programming of *statewide* interest—clearly ignoring the distinction between statewide and localized programming that the Commission affirmed in the STELAR Order.⁹ Seemingly acknowledging the Bureau’s error, the County attempts to cure it by attaching to the Opposition what it calls a “sampling” of “local issues” that the Denver Stations have purportedly covered.¹⁰

⁸ AFR, at 16 (citing STELAR Order, ¶ 18 n.85) (emphasis added).

⁹ STELAR Order, ¶ 18 n.85.

¹⁰ Opposition, at 6-8, Appendix A (subjects nos. 10-12).

As an initial matter, the County’s submission of this additional, “new” evidence—in the form of a series of hyperlinks to stories it found on the Denver Stations’ websites—is improper and should be ignored.¹¹ That procedural defect aside, the County’s new evidence underscores the dearth of the Denver Stations’ coverage of the County, and it is woefully inadequately to warrant any enhancement under the “local service” factor. The County cites a mere eight stories of news allegedly tailored to La Plata County across three Denver stations. But of those eight stories, only three of them appear to have actually been aired on television. The other five stories appear to have been online-only stories—indeed, several of them cite to a newspaper, *The Durango Herald*, as their source—and two of those five are stories about this very proceeding and came *after* the Order was released.¹² It is reasonable to assume that had there been additional evidence of local programming specifically tailored to the County, the County would have included it (especially in light of all of the statewide programming examples that it provided).

Also notable is the County’s attempt to conjure up evidence of the Denver Stations’ “local service” in the absence of those Stations’ participation in or support of the Petitions. If the Denver Stations believed they were well-positioned to serve the *local* interests of a county some 330 miles away, it is reasonable to assume they would have joined this proceeding. Presumably, the Denver Stations are instead focused on providing quality coverage of the communities spread across their already large and unwieldy DMA. The Opposition neither addresses the County’s failure to secure any of the Denver Stations’ support, nor the Commission’s warning that, without the “willing

¹¹ See 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”); *id.* § 1.115(j). This is a foundational principle of administrative law. *Cf. Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (explaining that a party is not allowed “to sit back and hope that a decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence”).

¹² Opposition, at Appendix A (subject nos. 10-12).

participation of the affected broadcaster, modifying the market of a particular television station, in itself, would not result in consumer access to that station.”¹³

Finally, contrary to the County’s allegation, the Albuquerque Stations’ position is hardly “self-serving.”¹⁴ Indeed, the economics may well suggest that the Albuquerque Stations would fare better by accepting this modification and then pursuing their own market modifications to try and achieve a net increase in their service areas. Instead, they are advocating for the retention of localism as a foundational premise of the DMA system and to avoid a result that, logically played out, will result in further modifications based upon state lines rather than localism.¹⁵

For the reasons set forth in the Application for Review and those above, the Commission should reverse the Order.

Respectfully submitted this 15th day of May, 2017.



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¹³ STELAR Order, ¶ 14.

¹⁴ Opposition, at 2.

¹⁵ The Bureau’s January 2017 decision to modify the market of Wisconsin television station WSAW-TV to include counties in the Duluth DMA reveals that the risk of such a result is real. In that case, the Bureau also waived its evidentiary requirements and over-emphasized the new third factor with respect to two counties that were not technically orphan counties at all—and instead were allegedly “underserved” by “in-state” stations. Thus, if not corrected by the Commission, the errors in this proceeding could multiply—well beyond orphan counties. *Gray Television Licensee, LLC, Modification of the Satellite Television Market for WSAW-TV, Wausau, Wisconsin*, Memorandum Opinion and Order, DA 17-74, MB Docket No. 16-293 (Jan. 17, 2017).

Certificate of Service

The undersigned does hereby certify that I caused a copy of the foregoing **Reply to Opposition to Application for Review** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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This the 15th day of May, 2017.



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